



## Ask the Attorney with John Brower, J.D.

**QUESTION:** *I am a parent of a child who has just been found eligible for special education services. When I talk with other parents of special education students and with school officials they are always talking about the "law and rules". What laws and rules are they referring to? How do I become familiar with them?*

**ANSWER:** One of the reasons it can be difficult to understand “school law” is that there are so many different sources of “laws and rules” that are applicable to public schools. I have found it easiest way to explain this to someone new to this area of the law is to first look at an overview, and then look at each of the different sources of the laws, starting with the federal level (Washington), then the state level (Michigan) and ending with your local Intermediate School District and local school board.

Part I will provide an Overview, while Part II will cover the role of the federal government, Part III, the state government, and Part IV the local ISD and school district, with some research tips, and practical suggestions similar to what I provide to new clients of my law office when I first meet with them.

### **PART I - OVERVIEW**

The federal (US government), the state (Michigan government), and your local school districts (your Intermediate School District and local school board) all have varying authority to create law (or rules) that depending on any given situation may be applicable to general and/or special education students. While true “laws” are only created by elected officials, the rules and regulations created by administrative agencies to implement the laws in the right setting can also have the power of a law.

Federal Level - On the federal level, the laws are created by the elected Congresspersons and signed into law by the President. Many laws condition the receipt of federal money on a state or local school agreeing to meet certain conditions. That is one reason that many of the laws that apply to public schools do not apply to private schools that do not receive federal monies. However, other laws such as the Americans with Disabilities Act (ADA) are designed to control discrimination in public or school accommodations, so they may apply to all schools, both private and public.

Most laws have companion regulations (rules) that are created by the federal agency that is responsible for implementing a particular law. As to laws relating to education, the federal

agencies charged with carrying out the law are generally the Department of Education or the Justice Department.

State Level - On the state level, there also are laws relating to education passed by the Michigan legislature and signed by the governor. Some laws are designed to meet the funding requirements of federal law so the state can qualify for federal funds (e.g. IDEA), while others again are designed to control conduct. As on the federal level, state laws generally have companion regulations, except the Michigan Department of Education creates the regulations via a public process called “rule making”.

Local Level - On the local level, your local elected local school board may adopt policies that are applicable to just your school district or the Intermediate School Board (ISD) who may adopt policies for the entire ISD. These policies are then implemented by the superintendent and his or her administration.

Controlling Law and Regulation – Sorting out which law or rule controls can be a problem and can result in some confusion. Simply, while a local school district can offer more in terms of benefits or protection than what the federal and state laws and rules/regulations require, it cannot provide less. In turn, while the state can offer more than what the federal government requires, it cannot provide less. For many reasons, including drafting errors, attorneys for both school districts and parents can spend considerable time and effort in determining (and arguing) exactly which law or rule controls any given situation.

Role of the Courts - When conflicts arise regarding the proper application of the law or interpreting exactly what the legislature intended when it passed a law, a parent or the school may elect to have a court of proper jurisdiction interpret the law. The courts also handle appeals from state level review in IDEA due process hearings and appeals from decisions of local school boards. Exactly which school districts will be affected by a court’s interpretation of a law depends on the jurisdiction of the court and the decision itself is outside the scope of this answer.

Finding Applicable Law and Regulation - to be able to locate and have a lay persons understanding of “the laws” that may be applicable to a particular situation requires one to examine federal, state and local laws and regulations:

Hope this helps your understanding;

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NOTE: Next week, Part II – the Federal Role.

## PART II - FEDERAL ROLE

QUESTION: *I am a parent of a child who has just been found eligible for special education services. When I talk with other parents of special education students and with school officials they are always talking about the "law and rules". What laws and rules are they referring to? How do I become familiar with them?*

ANSWER: Also see last week's posting for PART I - OVERVIEW

Federal – the US Constitution grants to all public students and staff (with some limitations) a number of fundamental civil rights. Those rights are contained in the first 10 Amendments to the Constitution (e.g. the Bill of Rights). Such rights address free speech, freedom of religion, freedom of association, freedom to free from illegal searches, a right to due process of law, etc. In addition, as noted above, Congress creates laws to spend taxpayer monies or to regulate public conduct.

Once passed by Congress (and signed by the President) public laws are codified (organized) according to topic into one of the sections of the *United States Code* (U.S.C.). For example, IDEA, which is Public Law 105-37 (105<sup>th</sup> law – 37<sup>th</sup> Congress) is "codified" and found at 20 U.S.C., Chapter 33 (Education) starting at Section 1400 and continuing for some 50 sections. In legal terms, the way of referencing where the exact language that Congress passed can be found is called its "legal cite". For example, the section of IDEA that details the due process rights (procedural safeguards) can be found at 20 U.S.C. 1415.

<http://www.ideapractices.org/law/index.php>. Once a law is codified and placed in the United States Code, it is generally referred to as a statute.

Once passed by Congress and signed into law, the federal Department of Education is assigned the responsibility of creating regulations (rules) to uniformly apply the new law in all states. To do this, the Department drafts proposed regulations and then holds public hearings to solicit public comments. Once the final regulations are adopted, they have the force of law and all public schools must follow them. Those explanatory regulations are found in the *Code of Federal Regulations* (cited as C.F.R.). For example, regulations interpreting IDEA are found at 34 CFR Part 300.

<http://www.ideapractices.org/law/regulations/index.php>.

NOTE: I recommend that any parent of a disabled student read Appendix A of the regulations as it contains a set of commonly asked questions and answers that address some common issues that frequently arise.

Hope this helps your understanding;

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NOTE: Next week, Part III – State Role

## **PART III – STATE ROLE**

QUESTION: *I am a parent of a child who has just been found eligible for special education services. When I talk with other parents of special education students and with school officials they are always talking about the "law and rules". What laws and rules are they referring to? How do I become familiar with them?*

ANSWER: Also see posting for PART I – OVERVIEW and PART II – FEDERAL ROLE

State Law – The state’s requirements for the operation of its public and private schools in found in the Michigan Revised School Code. As is done on the federal level, once a law is passed and signed by the governor, it is codified under a subject matter titling system. In Michigan, the School Code is in Chapter 380, found in the Michigan Compiled Laws - MCL 380.1. <http://michiganlegislature.org/law/mileg.asp?page=print&objName=mcl-chap380>.

In terms of special education services, the Michigan Legislature assigned to the State Board of Education the authority to create rules that insure that special education programs comply with federal law and regulations, as well as to insure that the maximum potential of each disabled student was met (MCL 380.1701). The Michigan Department of Education (MDOE), through a public hearing process adopted rules to implement both the federal standards and the increased benefits provided for by the Michigan legislature.

These rules are found in the Michigan Revised Administrative Rules for Special Education; which had nine parts and is indexed by a numbering system starting at Part I, with R 340.1701. Based on the federal Department of Education adopting new regulations after IDEA was amended by Congress in 1997, Michigan was also required to change its old rules. That process started with MDOE soliciting public comments on the proposed rules starting in 2001. Then there was a court ordered delay in the implementation of the proposed rules, followed by significant revision to the proposed rules. Many of the new rules become "law" on June 4, 2002. Those rules are indexed from R 340.1701 to R 340.1861. For most schools, this “rulebook” is a primary source of special education law. Additional rules related to special education process and procedures are now open for public comment through September 30, 2002. A copy of the new Michigan rules can be obtained from the Michigan Department of Education or downloaded from [http://www.michigan.gov/documents/Rules\\_28909\\_7.pdf](http://www.michigan.gov/documents/Rules_28909_7.pdf).

In the author’s opinion, it is unfortunate that the new rules are now silent in areas where the federal regulations control. Therefore, to effectively understand “the law”, one must have available (and locate the proper section) both the federal regulations from the CFR’s and the state’s “R rules”.

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NOTE: Next week, Part IV – Local Role and Suggestions.

## **PART IV – LOCAL ROLE and SUGGESTIONS**

*QUESTION: I am a parent of a child who has just been found eligible for special education services. When I talk with other parents of special education students and with school officials they are always talking about the "law and rules". What laws and rules are they referring to? How do I become familiar with them?*

**ANSWER:** Also see posting for PART I – OVERVIEW, PART II – FEDERAL ROLE and PART III – STATE ROLE

Local Policies – each elected school board can create policies (e.g. rules) that are applicable to their students as long as they do not violate applicable federal or state law, rules, or regulations. Local board policies cover such diverse subjects as student programs, discipline, curriculum requirements, in-district transfers, student's graduation requirements, parent's building visits, etc. The local school board has the power to create (and fund) different programs. That is one of the reasons that special education programs can vary between school districts. The school's central office maintains a copy of its policies available for public viewing.

Legal Research – with the growth of the Internet many of the statutes, regulations/rules applicable to special education are available via the Internet. The difficulty arises in interpreting what the documents mean and how they interrelate. To answer any particular question may require reviewing the published statutes, regulations, published letters from the federal and Michigan departments of education, Office for Civil Rights, as well as published rulings from local and state hearing officers.

One publication does a fair job of covering most this material. That is the Individuals with Disabilities Education Law Reporter (cited as IDELR) published by LRP Publications of Horsham, PA. This reporter is only available by subscription. As the annual cost is high, only the handful of attorneys and law firms that regularly represent schools or parents subscribe. In addition, copies are available in the libraries at the state's law schools and at those universities that grant degrees to teachers or school administrators.

Final Thoughts – When I meet with parents who wish to consult with an attorney with education law skills, or when I speak to parent organizations, I frequently here that some school staff person, another parent, or at times even an advocate from one of the non-profit parent organizations has told a parent that this or that "was the law". Further, this person tells them that "the law" is directly applicable to the parent's child. That may well be so, but to be sure I suggest that anyone receiving this type of information consider the source and verify the accuracy of the claim. To often the statement by school officials is self-serving. At other times, I have found that the statement was made by someone who was not familiar with all the applicable facts (that is one reason I will not render an opinion on a situation without a detailed discussion with the parent(s)) or was generally uninformed or was not familiar with Michigan laws, regulations and common practice?

My suggestion is that when someone makes this type of statement to you; if the person is a school person, ask (in writing if necessary) for a copy of the applicable law, rule, regulation, or court case that they are relying upon. After reading what is provided, you may well find that the “the law” may not be at all clear. It may not directly apply to your facts, or may be subject to different interpretations. It is these kinds of differences that keep the attorneys that represent school districts and parents busy.

The simple fact of education is that in the life of each child they only pass through the educational system one time. Therefore, each day in school is a precious and irreplaceable commodity. Therefore, I always recommended that if a question relating a legal matter is of some importance, that the parent consults with an attorney with experience in the interpretation of “the laws”. If a parent cannot afford to pay an attorney in private practice, there are funded legal services organizations and non-profit organization (see main page of [www.bridges4kids.org](http://www.bridges4kids.org)) who have trained advocates and a limited number of staff attorneys available to assist a parent in understanding “the laws” that are applicable to the situation facing their child.

Hope this helps your understanding of “the law” .

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